Buffalo Law Review

Volume 6 | Number 2 Article 64

1-1-1957

Torts—Testamentary Libel

Hugh Russ Jr.

soned that the plaintiff's offense fell within sections 177 and 180 of the New York Code of Criminal Procedure,[5] rendering him liable to arrest without a warrant and notice then as to his offense.

Judge Desmond, dissenting, argued that the policeman should have stated the reason for arrest to the plaintiff, since section 180 can apply only to ". . . grave crimes . . . or public disorders or breaches of the peace where there can be no uncertainty as to the cause." He deemed the plaintiff's offense clearly outside such category. Arguing alternatively, he said that though classed as crimes for jurisdiction purposes, traffic offenses are not susceptible to being termed crimes in this context. Accordingly, the defendant still was not protected by section 180 and was therefore required to tell the plaintiff the nature of his offense when he arrested him.

It would seem that logical statutory arguments can be framed for either side in this case. For this reason, policy considerations must be weighed. As conceded by the majority, it would have been reasonably simple for the officer to inform the plaintiff why he was taking him into custody. Indeed, the majority recommended this be done in such cases as a matter of administrative practise. The dissent pointed out the minimal burden such requirement would place on law officers, as contrasted to the "valuable and important right" one ordinarily has to be told why he is arrested. Further, speeding can hardly be classified a "public disorder" or "peace breach"—where one's very act apprises him of his offense—regardless of the danger it may cause. For this reason and the small effort involved in telling a traffic transgressor of his offense when arrested, the duty to inform should be made mandatory with police officers.

Testamentary Libel

The rule that allegedly libelous matter is defamatory per se, ". . . if it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking people, and . . . deprive him of their friendly intercourse . . . .",[6] was applied by the Court of Appeals in *Brown v. DuFrey.*[7]

5. N. Y. CODE CRIM. PROC. §177. A peace officer may, without a warrant, arrest a person, (1.) *For a crime,* committed or attempted in his presence; N. Y. CODE CRIM. PROC. §180. [An officer] must state his authority and cause of arrest, except where party is committing felony or is pursued after escape. When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of arrest, *except when the person is arrested in the actual commission of a crime,* or is pursued immediately after escape. (emphasis added).

6. *Mencher v. Chesley,* 297 N. Y. 94, 75 N. E. 2d 257 (1947); *Nichols v. Item Publishers,* 309 N. Y. 596, 132 N. E. 2d 860 (1956), 6 BUFFALO L. REV. 72 (1956).

7. 1 N. Y. 2d 190, 134 N. E. 2d 469 (1956).

In holding for the plaintiff, who brought an action against the estate of his former wife, the Court found defamatory material in her will which said that the plaintiff had abandoned her and left her destitute during life. The Court limited itself to considering whether or not the will contained libelous matter, thus not holding specifically whether a cause of action in "testamentary libel"[8] may be brought. In so holding, the Court said that counsel for the defendant had not raised the latter issue in timely fashion below, so that it could not be considered at this level.[9] The dissenters limited themselves only to considering the point dealt with by majority, but said the matter in issue was not libelous per se.

The Court's holding seems to fit readily into the traditional definition of defamation per se[10] and its concepts in the area of marital relations.[11] Further, it would seem that the decision impliedly recognizes such a cause of action against a defendant estate, since one never loses his objection to a court's jurisdiction over the subject matter of an action.[12]

Fair Comment

Fair comment, a policy measure protecting a free press, is a recognized defense to libel actions in New York.[13] This privilege protects a defendant who comments on matters germane to public interest, provided: (1) the statement made is a matter of comment or opinion rather than the assertion of a factual proposition; (2) is based on facts truly stated; (3) is a fair and reasonable inference from these facts, and (4) is made without actual malice.[14]

In the case of *Julian v. American Business Consultants,*[15] the plaintiff alleged he was libeled in defendant's book, which pictured him as a Communist "dupe"

8. The majority of reported cases have held a cause of action to exist against the testator's estate, but not against the executor personally. Annot. 87 A. L. R. 234 (1933). A lower court case in New York has adhered to this view. *Brown v. Mack,* 185 Misc. 368, 56 N. Y. S. 2d 910 (Sup. Ct. 1945). The case of *Citizens' and So. Nat'l Bank v. Hendricks,* 176 Ga. 692, 168 S. E. 313 (1933), disallowed a cause of action against the testator's estate.

9. N. Y. CIV. PRAC. ACT §446. Exception to the charge given to a jury by the court or any part thereof and to the granting or refusal of requests to charge, shall not be deemed to have been taken unless expressly noted by the party adversely affected before the jury have rendered their verdict. See also *Buckin v. Long Island R. Co.,* 286 N. Y. 146, 36 N. E. 2d 88 (1941).

10. *Mencher v. Chesley,* 297 N. Y. 94, 75 N. E. 2d 257 (1947).

11. *Keller v. Phillips,* 39 N. Y. 351 (1868); *Woolworth v. Star Co.,* 97 App. Div. 525, 90 N. Y. Supp. 147 (1st Dep't 1904); *O'Neill v. Star Co.,* 121 App. Div. 849, 106 N. Y. Supp. 973 (1st Dep't 1907).

12. *Newham v. Chile Exploration Co.,* 232 N. Y. 37, 133 N. E. 120 (1921).

13. *Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers,* 260 N. Y. 106, 183 N. E. 193 (1932); *Hall v. Binghamton Press Co.,* 263 App. Div. 403, 33 N. Y. S. 2d 840 (3d Dep't 1942), *aff'd.,* 296 N. Y. 714, 70 N. E. 2d 537 (1946).

14. See note 13, *supra.*

15. 2 N. Y. 2d 1, 137 N. E. 2d 1 (1956).